IN THE

Supreme Court of the United States

No. 524

MAX SHAMOS,

Petitioner,
(Appellant below)

—against—

PEOPLE OF THE STATE OF NEW YORK,

Respondent.
(Respondent below)

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK AND BRIEF IN SUPPORT THEREOF

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New York City.

INDEX

PAGE

Table of Cases Cited:

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To the Honorable the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Your petitioner, Max Shamos, respectfully shows:

Summary Statement.

Petitioner prays for a writ of certiorari to review the order of the Court of Appeals of the State of New York made on July 19, 1945, affirming a judgment of conviction of your petitioner for the crime of grand larceny in the first degree rendered against him and entered in the Office of the Clerk of General Sessions of the County of New York on December 24, 1943. That judgment was affirmed in the Appellate Division on November 3, 1944, and in the Court of Appeals on July 19, 1945; both without opinion.

Jurisdictional Statement.

Petitioner alleges that by reason of an aggregation of substantial errors committed upon the trial, he was denied

due process of law within the meaning of the Fourteenth Amendment of the United States Constitution, within the rule enunciated in:

Buchalter v. *New York,* 319 U. S. 427;
Snyder v. *Commonwealth of Mass.,* 291 U. S. 97;
Lisbana v. *California,* 314 U. S. 219;
Pierre v. *Louisiana,* 306 U. S. 354.

A federal question was raised by your petitioner in his appeal to the Court of Appeals of the State of New York and that is sufficient to confer jurisdiction upon this Court even if no federal question was raised upon the trial. (*Home Insurance Company* v. *Dick,* 281 U. S. 397.)

Your petitioner quotes from the defendant-appellant's brief in the Court of Appeals, which said brief was duly filed in that Court and became a part of the record of this case in that Court:

"POINT VIII.

THE DEFENDANT DID NOT RECEIVE A FAIR TRIAL AND WAS DEPRIVED OF MANY OF HIS CONSTITUTIONAL RIGHTS AND PRIVILEGES.

The defendant is entitled to a fair trial. This is his constitutional right. His trial should be conducted in an unprejudiced and unbiased atmosphere. The Court should conduct the trial impartially and rule properly upon the evidence and testimony. The district attorney, as a quasi-judicial officer, should conduct himself with some restraint and with a view of affording a defendant a fair trial.

It cannot be denied but that the revengeful and hateful attitude of the district attorney and the hostile

attitude of the court brought a conviction of this defendant, upon improper testimony and evidence, and with a complete disregard for legal evidence."

If this jurisdictional statement is thin, then we assume that this Court will remit the proceeding to the Court of Appeals for amplification.

A Skeletonized Statement of the Facts Preliminary to a Recital of the Alleged Errors.

Petitioner was indicted, tried and convicted of grand larceny in the first degree for feloniously obtaining by trick and device from the complainant, Ethel Witz, $2100 on January 13, 1940.

Upon the trial, the People proved that two persons, Rose Cohen and Julia Weinstein, in the years 1939 to 1941 obtained from the complainant different advances amounting to $20,000 upon the representations that they, these women, were to invest the money with Max Shamos, the defendant in the criminal case and petitioner here, who had a mysterious and undescribed invention and that complainant "would receive $1000 for every $100 invested" (fols. 165, 168, 199).

On the Julia Weinstein trial she swore he did not say anything about an invention (fols. 280-281). She gave no evidence on the Shamos trial that either she or the women represented defendant's great wealth. Attorney Rosenblum put two nails in his client's coffin by testifying that defendant represented his wealth in seven figures, and he said something about patents (fol. 428).

No conspiracy was alleged in the indictment and neither the names nor the acts of Rose Cohen and Julia Weinstein were referred to (fols. 17 and 19). Complainant testified that defendant's name and identity were not disclosed to

her until after she had advanced substantial sums over two or three months time (fol. 295), commencing in March, 1939 (fol. 228).

The People's only proof of defendant's guilt was the testimony of complainant that after complainant had advanced $6000 (fol. 198) on January 13, 1940, defendant in the presence of Rose Cohen and Julia Weinstein and three other people, participated in these representations to complainant and caused her to go immediately to her savings bank and withdraw and give to Rose Cohen and Julia Weinstein $2100. Defendant did not go to the bank (fol. 185), and there was no evidence that the defendant (your petitioner) received any of these moneys at any time.

His only participation in the conspiracy (Complainant, fol. 242) was this one interview which lasted twenty minutes on January 13, 1940 in an apartment, "It wasn't too light; it was pretty light" (fol. 237). Complainant's description of the defendant was seriously attacked; at the Julia Weinstein trial complainant swore defendant was a dark man (fol. 243), whereas she admitted on the Shamos trial that he was light (fol. 238); she could not see whether he had hair or not (fol. 237); she described the wrong kind of glasses he wore (fols. 234, 611); whether the name was Shamos, Shimmel or Shamiel (fols. 263, 268); her testimony on the Weinstein trial that he handed out "Mason" cards for identification was changed in the Shamos trial where she swore that the cards were "Odd Fellows" (fols. 267, 269).

Of the five people present, the District Attorney called no one to corroborate complainant. Defendant (your petitioner) did not take the stand but he called three of them, and they categorically denied any such transaction. Julia Weinstein (fols. 808-809), Sam Vogelhut (fols. 669, 674), Sophie Wilner, who swore she had never seen the defendant (fol.

633). The District Attorney in his summation praised his failure to call these witnesses; said it showed:

> "how fair a trial this dirty, rotten, behind-the-scenes swindler is getting in this Court" (fol. 1196).

Complainant never saw defendant again until the Julia Weinstein trial, April 1943 (fols. 1187 and 241).

With the People's proof of defendant's conviction perhaps insufficient to warrant conviction, the District Attorney called to the witness stand defendant's former attorney to give damaging testimony of defendant's prior confidential communications.

The Major Errors Committed Upon the Trial; Which in the Aggregate Resulted in Denial of Petitioner's Constitutional Right to a Fair Trial and Resulted in His Conviction Without Due Process of Law.

(1)

Over the objection and exception of defendant (fol. 419) one Jacob J. Rosenblum, an attorney, testified on defendant's trial in November, 1943, to confidential communications made to him by the defendant in February, 1942, implicating him, in the opinion of Attorney Rosenblum, in the crimes of Rose Cohen and Julia Weinstein (fols. 429, 430, 433, 453, 472, 562). The attorney was employed to obtain an adjournment in the Rose Cohen matter to permit the defendant to make restitution (fol. 467), and if defendant failed to make restitution, he was to go to the General Sessions represented by Attorney Rosenblum and answer fully all questions put to him by the judge (fol. 477). This, of course, implied a waiver of immunity. Attorney Rosenblum received $1000 on account of his fees which for the whole matter would have been $5000 (fols. 539 and 479). At that time, Rose Cohen had been convicted and sentenced to 15 to 30 years imprisonment (fol. 518); but in the opinion of

Attorney Rosenblum, that sentence might be greatly lightened and even imprisonment avoided if restitution was made (Rosenblum, fols. 514, 519). The purpose of the adjournment was to give the defendant thirty to sixty days within which to raise $40,000 to $50,000 to make restitution, $20,000 to complainant and the balance to other victims (fols. 428 and 199). Further facts with citations from the record will be given in our annexed brief. Suffice it to say for the moment that the attorney's testimony of his former client's confidential admissions was the crucial proof in the case.

The admission of this evidence was in direct violation of the statutes of the State of New York and the fundamental right of a citizen to have the mouth of his attorney sealed; a right which has been scrupulously observed for three hundred years in all the courts of this country. (Cases cited in our brief.)

(2)

Proof was submitted at the trial of other larcenies besides the one upon which petitioner was indicted, but they were crimes committed by Rose Cohen and Julia Weinstein and no connection of the defendant therewith was shown. They were admitted as the acts of co-conspirators.

(3)

Proof was admitted of the conviction of Rose Cohen and Julia Weinstein as co-conspirators which is incompetent evidence of the guilt of the defendant where their trials were separate. The District Attorney in his summation went to the extent of saying that another jury had convicted Julia Weinstein in five minutes (fol. 1136). Rose Cohen had been sentenced to fifteen to thirty years imprisonment (fol. 513) and Julia Weinstein faced a similar sentence (fol. 1136).

(4)

The Court admitted into evidence $2,000,000 of promissory notes given by Rose Cohen and Julia Weinstein on April 14, 1941 (fol. 203), long after the last larceny in October, 1940 (fol. 200), and more than a year after the defendant's one and only appearance on January 13, 1940; and with no evidence that defendant had knowledge thereof. No proof was given by the People of the circumstances inducing the giving of these notes except the District Attorney's cross-examination of defendant's witness, Julia Weinstein, who testified that she had given the notes when complainant threatened her: "She wanted to throw acid in my face" (fol. 837).

(5)

A summation by the District Attorney so violative of the law and the defendant's rights, and so vitriolic as to destroy even the semblance of a fair trial. Under the law of the State of New York, a public prosecutor differs from a private attorney and may not resort to invective or name-calling. We quote from a leading New York decision:

> "Language which might be permitted to counsel in summing up a civil action cannot with propriety be used by a public prosecutor, who is a quasi-judicial officer, representing the People of the state, and presumed to act impartially in the interest only of justice. If he lays aside the impartially that should characterize his official action to become a heated partisan, and by vituperation of the prisoner and appeals to prejudice seeks to procure a conviction at all hazards, he ceases to properly represent the public interest, which demands no victim, and asks no conviction through the aid of passion, sympathy or resentment." (People v. Fielding, 158 N. Y. 547.)

(6)

The Judge's charge was unfair from beginning to end. The only disputed issue was whether or not the complainant identified defendant, as her visitor on January 13, 1940. The Judge charged the jury as an uncontroverted matter that she identified the defendant (fol. 1274). The Charge failed to call the attention of the jury to the fact that of the five witnesses present, the People had called no one and the defendant called three who had categorically denied the entire story.

The entire charge was a summation of the varied and many crimes of Rose Cohen and Julia Weinstein with only a passing reference to defendant's disputed connection therewith.

There was an utter failure to delineate the conflicting proof on the cardinal issue and the weight of the evidence, and a failure to instruct the jury to weigh the uncorroborated, impeached evidence of the complainant in the light of her interest to force restitution.

> "A judge is more than a moderator; he is charged to see that the law is properly administered, and it is a duty which he cannot discharge by remaining inert." (Quercia v. U. S. 466, 469.)

Prayer for Writ.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Court to the Court of Appeals of the State of New York commanding said last named Court to certify and send to this Honorable Court a full and complete transcript of the record of all proceedings in the within cause and to stand to and abide by such order and direction as to your Honors shall seem meet and the circumstances of the case require

and that your petitioner may have such other and further relief or remedy in the premises as to this Court may seem proper.

Dated: New York, N. Y., October 17, 1945.

MAX SHAMOS,
Petitioner.

ALVIN CUSHING CASS,
Counsel for Petitioner,
1 Cedar Street,
New York City.

STATE OF NEW YORK,
CITY OF NEW YORK,
COUNTY OF NEW YORK, *ss.*:

On this 17th day of October, 1945 before me personally appeared Max Shamos, to me known and known to me to be the petitioner described in and who executed the foregoing petition, and he duly acknowledged to me that he executed the same.

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MAURICE FREIMAN,
Notary Public, N. Y. County
N. Y. County Clk's #241
Reg. #380 F 7
Commission Expires March 30, 1947